Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of BellSouth Telecommunications, Inc.'s Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers	WC Docket No. 03-251

REPLY COMMENTS OF SBC COMMUNICATIONS INC. IN RESPONSE TO NOTICE OF INQUIRY

Jack Zinman
Gary L. Phillips
Paul K. Mancini
SBC COMMUNICATIONS INC.
1401 I Street, N.W.
Washington, D.C. 20005
(202) 326-8800

Colin S. Stretch
Joseph J. Bial
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for SBC Communications Inc.

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INTRODUCTION AND SUMMARY

Despite the broad array of commenters in this proceeding, three critical points are not in serious dispute:

First, as the Commission's own findings confirm, the broadband Internet access market is highly competitive. Although the cable incumbents continue to control well over half the market, DSL-based providers are running a strong second, and other technologies are emerging to ensure that broadband will continue to be available over a "variety of technologies."[1] The upshot is that the broadband Internet access market is characterized by, in Chairman Martin's words, "fierce competition."[2]

Second, in broadband as in all sectors of the communications industry, consumers are increasingly demanding – and carriers are increasingly providing – bundles of service. Just as in the highly competitive wireless market, broadband service providers offer packages of services that provide consumers attractive, innovative services, increased simplicity, and, most of all, lower prices. It is thus little wonder that consumer surveys reveal that customers that purchase bundled service report higher satisfaction with their service providers than customers that do not.

Third, to the extent consumers nevertheless demand broadband Internet access on an unbundled, standalone basis, the marketplace is responding. The cable providers, like other emerging providers, already offer such a product, and ILECs, responding to nascent consumer demand, are increasingly doing so as well.

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[1] Fourth Report to Congress, *Availability of Advanced Telecommunications Capability in the United States*, 19 FCC Rcd 20540, 20553 (2004) ("*Fourth Report to Congress*").

[2] The Hon. Kevin J. Martin, Chairman, FCC, *United States of Broadband*, Wall St. J., July 7, 2005, at A12 ("[B]roadband platforms are engaged in fierce competition. In addition to telephone and cable providers, broadband access is increasingly being delivered to consumers via satellite, wireless, and fiber or powerline providers."); *see* Kevin J. Martin, Commissioner, FCC, Remarks to the NARUC Conference, Washington, D.C. at 8 (Mar. 8, 2004).

In these circumstances – where, as NASUCA puts it, "the changes taking place in the telecommunications marketplace" are already leading toward the standalone broadband Internet access offerings that some commenters propose[3] – there can be no serious argument supporting Commission intervention. On the contrary, the Commission has already held that, where, as here, a supposed "tying" product market is "competitive," there are virtually no anticompetitive concerns associated with product bundling and thus no reason to interfere with the "public interest benefits" that come from such bundling.[4]

Indeed, in the broadband context, the path before the Commission is clear, and it leads directly *away* from regulatory interference in the market. Two weeks ago, the Supreme Court resoundingly affirmed the Commission's first step towards creating a deregulatory framework for the provision of broadband Internet access, by ruling that broadband Internet access provided by the cable incumbents is solely an "information service" subject to regulation only under Title I of the Communications Act.[5] As Chairman Martin stressed in the wake of that decision, the Court's ruling "paves the way for the [Commission] . . . [to] remove the legacy regulation that reduces telephone companies' incentives to provide broadband" and thus "to place telephone companies on equal footing with cable providers."[6] The Commission should do exactly that. The broadband regulatory structure in place today imposes unique and costly requirements exclusively on ILEC providers of broadband Internet access, leaving all other platforms –

[3] NASUCA at 2 (emphasis added).

[4] Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Market*, 16 FCC Rcd 7418, ¶¶ 10-12 (2001) ("*CPE Bundling Order*").

[5] *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs*., Nos. 04-277 and 04-281, 2005 WL 1498860, at *7 (U.S. June 27, 2005).

[6] Martin, *United States of Broadband, supra*; *see also* FCC News Release, *Chairman Kevin Martin's Announcement Regarding The Supreme Court's Decision in Brand X* (June 27, 2005) ("Martin *Brand X* Statement").

including the cable incumbents – to operate free from federal regulation. This upside-down state of affairs distorts investment and hampers consumer choice, and it has continued for far too long. It is time for the Commission to act quickly to harmonize broadband regulation. Doing so involves – not, as some commenters contend, the imposition of yet another one-sided regulatory obligation on the nondominant DSL-based providers – but rather leveling the playing field and providing ILECs the same deregulatory freedoms that have long been available to other providers in this highly competitive, fast-paced arena.

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The remainder of these reply comments is organized as follows: Part I discusses the competitive consequences of bundling, including the "mandatory" bundling of broadband Internet access service with legacy services such as wireline voice service. Part I reiterates that, as explained in SBC's opening comments, bundling of broadband with other services has hastened the development of intermodal competition, enhanced customer choice, and triggered a wave of investment in broadband infrastructure of the sort the Commission is statutorily mandated to "encourage."[7] Part I then explains that commenters' hypothesized competitive concerns with mandatory broadband bundling – specifically, the frustration of consumer choice and the inhibition of wireline voice substitutes such as VoIP and wireless – are theoretically incoherent in view of the Commission's own repeated conclusion, confirmed in findings released just last week, that the broadband Internet access market is highly competitive.

In Part II, we explain that, particularly in view of the "fierce competition" in broadband, there is no sound policy basis – much less legal authority – to support a regulatory mandate to provide standalone broadband. Among other things, Part II explains that, contrary to

[7] *See* 47 U.S.C. § 157 note.

commenters' claims, sections 201 and 202 of the Communications Act do not provide the Commission with authority to mandate standalone broadband Internet access at regulated rates, as commenters propose. Part II also notes that, in light of recent activity in the states, the Commission should confirm that state commissions likewise have no authority to mandate the provision of standalone broadband Internet access.

Part III addresses commenters' request that the Commission revisit the Commission's *Declaratory Ruling* in this docket. It explains that the Commission's ruling, like the *Triennial Review Order* on which it was based, was properly motivated by a desire to encourage facilities-based competition, and it explains that a contrary ruling would have the exact opposite effect.

Finally, Part IV explains that, contrary to commenters' conclusory claims, the mandatory bundling of broadband Internet access with wireline voice service is not unlawful tying under the antitrust laws.

DISCUSSION

I. COMMUNICATIONS BUNDLES, INCLUDING BUNDLING OF BROADBAND WITH LEGACY SERVICES, ARE PROCOMPETITIVE

As SBC explained in its opening comments – and as the comments in the record confirm – the effects of bundling, including the bundling of broadband with "legacy" services, are overwhelming procompetitive. Bundling enhances efficiency, promotes consumer welfare, encourages intermodal competition, and facilitates the deployment of broadband infrastructure in a manner consistent with the statutory mandate set out in section 706 of the Act. As SBC further explained, moreover, the allegations that competitive harm flows from mandatory bundling – in particular, that such bundling inhibits consumer choice and forestalls deployment of new services – hinge on the counterfactual assumption, which the Commission has already rejected, that the broadband market is not competitive.

A. Bundling Encourages Investment and Enhances Consumer Choice

The Commission has expressly acknowledged "the public interest benefits of bundling."[8] Bundling, the Commission has explained, eliminates "transaction costs" and thus results in lower prices; it facilitates "consumer choice" by spurring intermodal competition; and it encourages deployment and adoption of "new, advanced, or specialized services" by "offering consumers the choice of purchasing packages of products and services at a single low-rate."[9]

As the comments in the record make clear, these procompetitive benefits are undoubtedly being achieved through the bundling of broadband services with "legacy" services. As SBC explained in its opening comments, the major cable operators' aggressive marketing of high-speed Internet services has come in the form of bundles with the traditional video service they have sold for decades (and increasingly with voice service).[10] Likewise, from the telco perspective, the ability to bundle broadband with local voice service allowed incumbent LECs to realize economies of scale and scope that permitted them to become an effective and efficient competitive alternative to the cable incumbents.[11] And the resulting head-to-head competition has brought about enormous consumer gains. Indeed, SBC recently announced that customers could purchase xDSL-based broadband Internet access, as part of a bundle with voice, for $14.95 per month, and, notwithstanding the cable incumbents' successful efforts to resist such pricing

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[8] *CPE Bundling Order* ¶ 10.

[9] *Id.*

[10] *See* SBC at 6; *see also* Comcast at 4 (noting that "[e]conomies and efficiencies are produced when a customer purchases" a bundle of services).

[11] *See* SBC at 13, 16-18; BellSouth at 2-3; Verizon at 12.

pressure in the past,[12] SBC's "phone and cable competitors are now rolling out promotions that include their own *significantly lower rates*."[13]

Nor are the consumer benefits of bundling confined to broadband customers. On the contrary, every aspect of the communications industry is increasingly characterized by product bundles, including, most notably, the wireless segment. Wireless carriers routinely bundle local and long distance along with handsets and, increasingly, data.[14] Driven in part by the efficiencies resulting from this bundling, the wireless market has become "by far the most competitive and innovative . . . in the Commission's purview."[15] Indeed, even opponents of bundling in this docket tout the virtues of "bundled local, long distance, and international calling to business and residential consumers."[16] And, in 2001, the Commission specifically eliminated various restrictions on bundling service with customer premises equipment ("CPE"), stressing that "*all* carriers, both incumbent and nondominant carriers, in *all* markets, demonstrate a desire to compete for customers through bundled service offerings," and further emphasizing that

[12] *See infra* pp. 16-17.

[13] Dionne Searcey, *The Price War For Broadband Is Heating Up -- As SBC Cuts Its Prices, Comcast, Cox and Verizon Offer Promotions; Getting Advice from Darth Fader*, Wall St. J., June 29, 2005, at D1 ("*Price War For Broadband*") (emphasis added); *see also id.* ("While many of the latest deals are being targeted at specific markets, together they are available to a wide swath of Internet users.").

[14] *See* SBC at 7; Verizon at 13-14.

[15] Ninth Report, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 04-111, FCC 04-216 (rel. Sept. 28, 2004) ("*Ninth Report*"), Statement of then-Chairman Powell. *See also* Verizon at 3 n.3 ("'[B]undling is an efficient promotional device which reduces barriers to new customers and which can provide new customers with CPE and cellular service more economically than if it were prohibited.'") (quoting Report and Order, *Bundling of Cellular Customer Premises Equipment and Cellular* Service, 7 FCC Rcd 4028, ¶ 19 (1992)).

[16] RNK at 2.

permitting them to do so would "enable them to offer innovative packages of goods and services that will provide customers with efficiencies and pricing that they demand."[17]

For their part, consumers are responding to the array of choices in the marketplace by overwhelmingly expressing their preference for bundled services. As Verizon properly explains, product bundles simplify the task of selecting and purchasing products, which is presumably why "automobile manufacturers" sell cars with options ranging from "cup holders to navigation systems to different types of engines."[18] And consumers plainly prefer such simplification in the communications industry: As SBC pointed out in its opening comments, "a recent survey reported that 51 percent of households *already* choose bundles of at least two communications services and found that 'customers who bundle services report higher overall satisfaction than those who are not bundling services.'"[19] In short, where there are efficiencies to be gained from bundling products and services – in the communications industry no less than in the sneaker business[20] – consumers will demand them and the marketplace will provide them. The result is better service that is more responsive to consumer demand, at lower cost – all of which is, in Commissioner Abernathy's words, a "boon for consumers."[21]

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[17] *CPE Bundling Order* ¶¶ 11, 16 (emphasis added); *see id.* ¶ 17 (noting that bundling allows "the fixed costs of providing service to be spread over a larger population of users, achieving economies of scale and lowering the cost of providing service to each subscriber").

[18] Verizon at 4; *see* Verizon, Evans Decl. ¶¶ 22-23.

[19] SBC at 1 (citing Press Release, J.D. Power and Associates, *J.D. Power and Associates Reports: Customer Satisfaction Increases as Stiff Rate Competition and Bundling Cause Steep Drops in Long Distance Spending* (July 1, 2003)).

[20] *See* Verizon at 6.

[21] Kathleen Q. Abernathy, Commissioner, FCC, Preserving Universal Service in the Age of IP, Remarks at the University of Colorado at Boulder, Boulder, CO at 3 (Oct. 21, 2004).

As SBC has already explained, moreover, the intermodal competition spurred on by communications bundles is consistent with Congress's vision in enacting the 1996 Act. Congress expected that carriers would challenge one another on their traditional turf, and, emboldened by their ability to offer bundles of service, that is exactly what carriers are doing. As noted above and explained in detail previously, the cable operators are now bundling video, data, and voice, creating the marketing "triple play" that customers are signing on to in droves.[22] And the telcos are responding in kind: SBC's newest promotion "offer[s] to cable broadband subscribers three months of free Internet if they switch over from a rival cable provider," and "[c]able customers who switch to SBC's Dish Network satellite service also will get three months of video plus HBO and Showtime free."[23]

This aggressive, no-holds-barred competition is also yielding a spate of new investment, as carriers – particularly the telcos, which have to date been inhibited by capacity constraints in the legacy copper network – invest staggering amounts of capital in the race to provide consumers with bundles of high-speed capabilities, including Internet access, video, and other services.[24] This investment – which section 706 of the Act directs the Commission to "encourage" – promises to touch-off an explosive new era of competition in the communications marketplace, and that competition will necessarily take the form of new and innovative service bundles.[25]

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[22] *See* SBC at 6 & n.8.

[23] *Price War For Broadband*, *supra*.

[24] *See* Verizon at 20 (noting that Verizon is "expanding [its] fiber networks to provide new and improved services to consumers [such as] . . . video programming and entertainment services"); SBC at 12-13.

[25] *See* Verizon at 6 ("[B]undling often enables sellers to reduce their production costs and to produce goods or services more efficiently."); Verizon, Evans Decl. ¶¶ 12-44 (discussing

B. Commenters' Claims of Anticompetitive Harm Resulting from Mandatory Broadband Bundling Are Unsupported and Irrational

Several commenters claim that the ILECs' mandatory bundling of broadband – *i.e.*, their alleged refusal to sell DSL-based broadband Internet access on a standalone basis, to customers that do not also subscribe to the ILECs' voice service – is anticompetitive. As they see it, this policy inhibits consumer choice by forcing customers to take wireline voice when they prefer to obtain broadband alone,[26] and it thereby inhibits the growth of services – including VoIP and wireless – that offer a substitute for wireline voice.[27]

These claims, however, run headlong into the Commission's own holding that, where "markets are competitive, [any] risk of anticompetitive conduct" stemming from product bundles is "virtually" nonexistent.[28] As the Commission has explained, "even dominant carriers" face "economic difficulty . . . in attempting to link forcibly the purchase of one component to another."[29] And where the market for the allegedly tying product is competitive, any risk of such forcing disappears altogether, as the "competitive market" itself will ensure "the separate availability" of the product in question if that is what customers want, thus foreclosing the possibility of competitive harm.[30]

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economics of bundling and confirming that some products are not profitable to offer without combination offering); SBC at 4, 12-14, 27-28.

[26] *See, e.g.*, CompTel/ALTS at 3, 5 (bundling frustrates consumer choice by requiring end users "to purchase the incumbent's legacy voice service as a precondition to subscribing to its DSL service").

[27] See RNK at 3, 4; Vonage at 2-3; T-Mobile at 4.

[28] *CPE Bundling Order* ¶ 11.

[29] *Id.* ¶ 12.

[30] *Id.* ¶ 18; *see id.* ¶ 23 ("In light of our findings that both the CPE and interstate, domestic, interexchange markets are competitive," it is "extremely unlikely that nondominant interexchange carriers could restrict consumer choice for components of a bundle.").

That finding is directly on point here. "The Commission's own findings . . . repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market."[31] As the Commission told Congress last September, the cable incumbents have "maintained the course" identified in prior Commission reports, such that, as of December 2003, they accounted for approximately 58% of high-speed lines.[32] At the same time, the Commission stressed that the existence of other broadband platforms – including wireless (unlicensed and licensed), broadband-over-power-lines, and satellite – ensure that, even as cable solidifies its lead in the marketplace, broadband will continue to be offered over a "variety of technologies."[33] The Commission's latest findings, released just last week, confirm these trends.[34] "The competitive nature of the broadband market, including new entrants using new technologies, is driving

[31] *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003).

[32] *Fourth Report to Congress* at 20568. Cable's share of "advanced services" lines – defined as lines providing at least 200 kbps in each direction – is even more pronounced, reaching more than 75% as of December of last year. *See id.* at 20555, Chart 2.

[33] *Id.* at 20553, 20557-62; *see* Notice of Proposed Rulemaking and Declaratory Ruling, *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 19 FCC Rcd 15676, ¶ 37 n.82 (2004) ("Broadband Internet access services are rapidly being developed or provided over technologies other than wireline and cable, such as wireless and powerline."); Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange* Carriers, 18 FCC Rcd 16978, ¶ 263 (2003) ("*Triennial Review Order*") ("The Commission also has acknowledged the important broadband potential of other platforms and technologies, such as third generation wireless, satellite, and power lines."), *vacated in part and remanded*, *USTA v. FCC*, 359 F.3d 554 (D.C.Cir.), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

[34] *See High-Speed Services for Internet Access: Status as of December 31, 2004*, Industry Analysis Div., Wireline Comp. Bureau, FCC, at 2 (July 2005) (noting that, during the second half of 2004, subscribership to high-speed services increased by 17%; cable modem lines increased to 21.4 million (to DSL's 13.8 million); and high-speed connections by means of other platforms (including satellite, terrestrial wireless, fiber optic, and powerline) increased to 1.2 million).

broadband providers to offer increasingly faster service at the same or even lower retail prices."[35] Thus, under the Commission's own findings, there is simply no "risk of anticompetitive conduct" stemming from ILECs' decision to sell broadband Internet access solely as a bundle with voice service. Rather, to the extent consumers want standalone broadband, the "competitive market" will ensure that they can get it.

Indeed, the "competitive market" is already doing exactly that. As the record makes clear, the major cable operators already offer standalone broadband to those consumers that want it (though most do so at a higher price than when bundled with video service and/or voice service),[36] and fixed wireless providers and other competitive carriers are increasingly doing the same.[37] And, importantly, in response to these competitive forces, most major ILECs either already have deployed a standalone broadband product or are working to develop one.[38] As NASUCA concedes, these developments "are based on recognition of the *changes taking place in the telecommunications marketplace*."[39] Those changes mean that, as BellSouth puts it, "[i]f the market demands standalone broadband services, [ILECs] will either have to adapt to these demands or face being a market loser."[40] In view of the competitive alternatives in the market, on no theory could the ILECs' failure to adapt to those demands inhibit consumer choice.[41]

[35] *Fourth Report to Congress* at 20552.

[36] *See* Comcast at 3-4; *see also* Verizon at 17.

[37] *See* SBC at 15-16; Verizon at 17 (noting that AOL is planning to roll out DSL-based broadband Internet access on a standalone basis).

[38] *See* Verizon at 18; Qwest at 4; SBC at 3, 15-16.

[39] NASUCA at 2 (emphasis added).

[40] BellSouth at 14.

[41] In this respect, Vonage (at 3) appears to recognize that, in light of the competition in the marketplace, it would be irrational for wireline companies *unilaterally* to refuse to sell standalone broadband, and it therefore posits that *both* cable and DSL providers refuse to sell

Nor do the supposed "switching costs" that come with changing broadband providers alter the analysis.[42] As RNK sees it, because customers that change broadband service providers lose "incidental features" such as an email address, they will be reluctant to switch to providers that, unlike certain ILECs, offer a standalone product.[43] As a threshold matter, however, it is impossible to see how high switching costs would lead the *ILECs* to refuse to offer standalone broadband. Again, it is the *cable providers* that control the bulk of the broadband market, and they do so through aggressively bundling broadband with legacy services such as traditional video. If the "switching costs" to which RNK refers were sufficient to prevent consumers from changing broadband service providers, then *cable providers* would presumably decline to sell standalone broadband, since their broadband market share (coupled with their enormous share of the video market) would give them the most to gain by doing so. Yet, as we have seen, the cable providers in fact permit customers to purchase broadband on a standalone basis.

In any case, RNK provides no reason to believe that the "cost" of changing an email address is prohibitively high. End users routinely incur that "cost" when they change jobs, move to a new geographic area served by different broadband service providers, or, of course, simply change broadband service providers. What is more, consumers can avoid that "cost" altogether by utilizing an email service, such as Yahoo! or Google, that allows end users to retain their email address regardless of geographic location or the identify of their Internet-access provider.[44] "Some consumers have begun to exploit the competitive pricing situation" between ILECs and

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standalone broadband. In fact, as the record makes clear, cable providers *do* offer standalone broadband, and ILECs are increasingly doing the same.

[42] *See* RNK at 12-13.

[43] RNK at 13-14.

[44] *See, e.g.*, Carl Shapiro & Hal R. Varian, *Information Rules – A Strategic Guide to the Network Economy* 109 (1999).

cable providers by switching back and forth among providers and "haggling" for better terms.[45] If RNK were correct – *i.e.*, if the "cost" of switching providers were prohibitive – they plainly would not be able to do so.

Nor is there merit to the contention that the purported unavailability of standalone DSL-based broadband Internet access "impairs [competitors'] ability to market VoIP service as a replacement product" for wireline voice service.[46] As SBC explained in its opening comments, the facts on the ground make clear that VoIP providers are hardly suffering under this supposed impediment. Vonage now serves over 700,000 VoIP subscribers, is adding more than 15,000 each week, and expects to surpass one million customers by year end.[47] Skype recently announced the 100-millionth download of its software and claims over 35 million registered users worldwide.[48] Indeed, RNK – one of the loudest critics of ILEC DSL practices in this proceeding – concedes that, despite those practices, "[m]any consumers have flocked to services of interconnected VoIP providers."[49] As even Vonage must ultimately concede, VoIP is *already* "'creating the robust, facilities-based voice competition that the framers of the 1996 Act envisioned.'"[50] The suggestion that the broadband bundling practices of the nondominant telco providers is standing in the way is implausible.

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[45] *See Price War For Broadband, supra.*

[46] RNK at 3, 10; EarthLink at 5.

[47] *See* http://www.vonage-forum.com/article1865.html.

[48] *See* SBC at 20.

[49] RNK at 10; *see also* MCI at 7 ("VoIP competition is rapidly increasing").

[50] Vonage at 9 (quoting Commissioner Kathleen Q. Abernathy, Overview of the Road to Convergence: New Realities Collide with Old Rules, Remarks at 1 (Jan. 22, 2004)).

Equally implausible is the claim that ILEC broadband bundling is inhibiting the growth of *wireless* services.[51] Again, wireless is the Commission's success story. The Commission's most recent annual report on competition in the CMRS market "conclude[d] that there is effective competition in the CMRS marketplace," that "competitive pressures continue to compel carriers to introduce innovative pricing plans and service offerings," and that "competitive conditions in the CMRS marketplace are providing significant benefits to consumers by a number of performance indicators."[52] Indeed, if anything, it is the growth and popularity of wireless – and the increasing number of wireless users that no longer have a wireline phone – that is driving the decision of ILEC broadband service providers to invest the time and expense necessary to develop and market a broadband service unbundled from wireline voice service.[53] In any case, the suggestion that ILEC mandatory broadband bundling practices are inhibiting the development of competition in wireless is unsupported and wrong.

[51] *See* T-Mobile at 2; EarthLink at 5.

[52] *Ninth Report* ¶¶ 2-3; News Release, FCC, *FCC Adopts Annual Report on State of Competition in the Wireless Industry* at 2 (Sept. 9, 2004) ("*FCC Wireless Report News Release*"); *see* SBC at 7-8.

[53] *See, e.g.*, Jeffrey Halpern, *et al.*, Bernstein Research Call, *Verizon: DSL Poised to Get Naked or Just Stripping Off Conventional Phone* at 1 (Nov. 5, 2004) ("DSL bundled with VoIP and/or wireless . . . potentially broadens Verizon's pool of potential customers to include wireless-only voice users like college students ('the young and the wireless') and highly price-sensitive consumers such as those that switched to competitive local exchange carriers."); Mike McCormack, *et al.*, Bear Stearns, *SBC Communications Inc.: Highlights from Meeting with SBC Management* at 2 (June 9, 2005) ("The company is working aggressively towards having broadband/wireless bundle available for the fall, noting that such a bundle would be attractive to students and recent graduates. SBC believes over 50% of access line loss is wireless-related."); Blake Bath, Lehman Brothers, *Qwest Communications Int'l: 1Q04 Wireless, Rev. Weak, Margins Improve* at 2 (May 5, 2004) ("Qwest is the first RBOC to offer DSL without a voice line, a service it refers to as 'naked DSL.' . . . [T]he company . . . hopes to attract wireless customers who don't need a voice line but want broadband connectivity.").

II. THE COMMISSION SHOULD NOT AS A MATTER OF POLICY, AND MAY NOT AS A MATTER OF LAW, MANDATE THE PROVISION OF STANDALONE BROADBAND INTERNET ACCESS SERVICE

SBC's opening comments established that, in view of the vibrant competition in the market for broadband Internet access, any determination to force the provision of standalone broadband Internet access would run directly counter to the bedrock principle that regulatory intervention is appropriate only where there is market failure.[54] SBC further explained that, in any event, Commission precedent and the text of the 1996 Act mandate a hands-off approach to broadband Internet access, particularly where, as here, the market is expanding rapidly and consumers are reaping enormous benefits.[55] Commenters provide nothing that calls either proposition into question.

A. As a threshold matter, it is important to stress that, as SBC explained in its opening comments, any mandate to provide standalone broadband Internet access would necessarily apply to *all broadband providers*, including, in particular, cable modem providers. As the Supreme Court stressed in *Brand X*, "[c]able companies and telephone companies" compete directly in the provision of broadband Internet access, and "[o]ther ways of transmitting high-speed Internet data into homes, including terrestrial- and satellite-based wireless networks, are also emerging."[56] There is no tenable basis for distinguishing telco-provided broadband Internet access from this raft of competitors, and thus no basis for subjecting DSL-based service to yet another unique regulatory burden (on top of the legacy regulation, including antiquated price regulation and accounting rules and the obligations under *Computer II*, that the Commission has held apply to ILEC DSL-based Internet access).

[54] *See* SBC at 21-25; *see also* BellSouth at 13-14.

[55] *See* SBC at 25-29; *see also* BellSouth at 14; MCI at 3-4, 8-9.

[56] *Brand X*, 2005 WL 1498860, at *7.

In fact, recent behavior in the marketplace demonstrates that, if anything, it is the cable incumbents, *not* the telcos, that possess market power. As noted in SBC's opening comments and reaffirmed at the outset, DSL-based providers have slashed prices and are heavily marketing their services – SBC in particular has recently announced a promotional price of $14.95 per month for customers that also purchase phone service. Yet, in the face of this competition, "promotional activity by [cable operators] has been minimal, because their emphasis has been on protecting margins and maintaining cash flow."[57] In fact, "cable companies have been reluctant to compete with the RBOCs on price,"[58] and indeed have "*refused* to drop cable modem prices,"[59] notwithstanding the fact that DSL prices are generally "lower than competing cable modem offers from the major MSOs."[60] Moreover, even as "DSL service has been established as the low cost provider, . . . market share has not shifted dramatically," as "cable operators have exploited their infrastructure advantage to deliver speeds that DSL struggles to match. Cable has accomplished this without lowering prices, measurably reducing market share or spending incremental capital."[61] Particularly in view of this evidence – which makes plain that any market power in the broadband Internet arena belongs to the cable incumbents – it is clear that any

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[57] Frank J. Governali, *et al.*, Goldman Sachs, *Cable Telephony/VoIP Threat Evolves, But Shouldn't Be Catastrophic* at 17 (Apr. 16, 2004).

[58] Mike McCormack, *et al.*, Bear Stearns, *June Broadband Buzz: Pricing Actions, WiMAX, and Cable Privatization* at 4 (June 22, 2005).

[59] Jeffrey Halpern, *et al.*, Bernstein Research Call, *Broadband Competition Intensifies as Penetration Advances; Price and Speed Define Main Battle Lines* at 3 (June 15, 2005) ("*Broadband Competition*") (emphasis added).

[60] Jeffrey Halpern, *et al.*, Bernstein Research Weekly Notes, *U.S. Telecom – Wireline: A Move Downmarket is Spurring Bells' DSL Growth* at 3 (May 13, 2005).

[61] Ted Henderson & Ethan Bellamy, Stifel, Nicolaus & Co., *U.S. Cable 2005 Industry Outlook* at 2 (Jan. 13, 2005) ("*2005 Industry Outlook*") (footnote omitted).

Commission rule here must apply across-the-board and may not apply solely to the nondominant, second-place telcos.[62]

It is equally clear that such widespread regulatory intervention is wholly inappropriate. Again, notwithstanding the ability of the cable incumbents to resist pricing pressure, the broadband market considered as a whole is highly competitive and evolving at breakneck speed. *All* broadband providers – telephone companies, cable providers, fixed wireless providers, power companies, and others – are investing enormous amounts to deploy broadband infrastructure, and all of them are competing mightily to win and retain customers. As commenters explain, in these circumstances, a regulatory mandate would only interfere with the market, distorting and frustrating investment and ultimately inhibiting customer choice by forcing service providers to act inefficiently and contrary to their business judgment.[63]

The perils of such regulatory intervention are perhaps best exemplified by the comments of those who propose it. Vonage – among the most ardent proponents of standalone broadband – expressly acknowledges that it seeks both a regulatory mandate to that effect *and price controls*. Vonage specifically asks the Commission to dictate that providers could charge "$40 for stand-alone broadband, but not $50 and certainly not $60 or more."[64] Such a price is appropriate, the theory goes, because it is purportedly a modest reduction in the approximate total price of a broadband/voice bundle.[65]

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[62] See Martin *Brand X* Statement (committing to develop "a framework for broadband that can be applied to all providers").

[63] *See, e.g.*, BellSouth at 12-13; BellSouth, Taylor Testimony at 9-10, 17-19; Verizon at 22.

[64] Vonage at 9.

[65] *See id.*

This proposal is ludicrous. For one thing, Vonage's proposed price point wrongly assumes that the *cost* of standalone broadband would be the same as the cost of that service when bundled with voice.[66] As BellSouth properly explains, when a telco – or any facilities-based provider, for that matter – provides multiple services over a single facility, the cost of that facility can be spread across the price of each of the services.[67] Where, by contrast, the consumer purchases only a single service – say, broadband service – the price for that single service must recover the fully allocated cost of the facility used to provide it. Thus, as Comcast properly explains, it is implausible to think that standalone broadband could necessarily be priced the same as (or even close to) the price for broadband when sold as part of a bundle.[68] The Commission itself has noted that bundling "eliminates the need for carriers separately to provision, market, and bill services, and therefore *reduces* the transaction costs that carriers pass on to consumers."[69] It follows that when carriers are forced to *un*bundle services that are more efficiently provided as a package, it *increases* the costs that must be "pass[ed] on to consumers." Vonage's back-of-the-envelope attempt to calculate a "fair" price for standalone broadband – simply by subtracting from the bundled price some portion to account for the absence of voice service – accordingly fails.

More fundamentally, in view of the competitive nature of the broadband market, it makes no sense to impose price regulation of *any* kind, even if the Commission could somehow determine the "right" price. It is well established that price regulation is appropriate only in the

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[66] *See id.*; *see also* RNK at 10.

[67] *See* BellSouth at 3; BellSouth, Taylor Testimony at 24-26.

[68] *See* Comcast at 4; *cf.* Verizon at 11 (noting that, in a typical *cable* bundle, "customers are essentially receiving their voice service for free") (internal quotation marks omitted).

[69] *CPE Bundling Order* ¶ 15 (emphasis added).

rare case of "severe" "market failure,"[70] where it is proven that "competition [i]s insufficient to protect consumers."[71] Here, however, the market is vibrantly competitive, and consumers that want a standalone broadband product can get it, at a price determined by the market. In this circumstance, price regulation would serve merely to "distort" competition and "prevent the market from operating efficiently."[72] As the Commission has held, in a competitive market, "competitive pressures [will] continue to compel carriers to introduce innovative pricing plans and service offerings, and to match the pricing and service innovations introduced by rival carriers."[73] There is accordingly no reason to distort the broadband market with the heavy hand of compulsory service and price regulation.

B. Quite apart from the absence of any sound policy reason to mandate the provision of standalone broadband (at regulated rates), there is no lawful basis supporting that result.

Commenters' pin their claims of Commission authority to mandate standalone broadband primarily on section 201(b)'s prohibition on "unjust and unreasonable" practices and section 202(a)'s prohibition on "unjust and unreasonable" discrimination.[74] The theory here seems to be

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[70] Michael Kende, Office of Plans & Policy, FCC, *The Digital Handshake*, 2000 FCC LEXIS 5115, at *80-*81 (OPP Working Paper No. 32 Sept. 26, 2000) ("There are only a select few network industries in the United States for which market failures have been considered severe enough that regulations have been imposed to govern prices and service quality on an ongoing basis. Where competition is possible, regulation may be relaxed or eliminated, to the extent that market forces can govern prices and services in place of regulations.").

[71] Kathleen Q. Abernathy, Commissioner, FCC, Developing a New Paradigm for Communications Regulation, Remarks before the New Jersey Communications Summit, 2005 FCC LEXIS 3464, at *14 (May 20, 2005).

[72] Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, et al.*, 11 FCC Rcd 20541, ¶ 13 (1996).

[73] *FCC Wireless Report News Release* at 1.

[74] 47 U.S.C. §§ 201(b), 202(a); *see* EarthLink at 2; CompTel/ALTS at 6; Vonage at 5-6.

that consumers have an inalienable, unfettered right to purchase any communications product they want on a standalone basis, and any packaging decision that interferes with that purported right – including in particular a requirement that consumers of broadband Internet access service also purchase voice service – necessarily compromises consumer choice in a manner prohibited by the Communications Act.[75]

This theory is badly flawed. As a threshold matter, sections 201 and 202 are irrelevant here. As the Supreme Court recently confirmed in *Brand X*, the service at issue here – broadband Internet access provided over a high-speed transmission facility – is an "information service" subject to regulation, if at all, under Title I of the Communications Act.[76] Sections 201 and 202 fall within Title II of the Act and are accordingly beside the point.

Even if sections 201 and 202 were relevant here, there is no plausible argument that the failure to offer standalone broadband runs afoul of those provisions. In this respect, the Commission's decision in *Orloff v. Vodafone Airtouch Licenses LLC* is directly on point. There, the complainant challenged, pursuant to sections 201 and 202, wireless providers' practice of offering discretionary "concessions" on an individualized basis "to attract new customers or retain existing customers."[77] These concessions included such things as billing credits, free minutes of use, free vertical features, and free or discounted equipment. The result of the concessions was that a customer obtained service "at a price lower than that paid by another

[75] *See, e.g.*, EarthLink at 2 ("The Commission should ensure that consumers are allowed to purchase only the services they wish from the ILECs if such services can be offered on a stand alone basis.").

[76] *See Brand X*, 2005 WL 1498860, at *8 ("[i]nformation-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its ancillary Title I jurisdiction").

[77] 17 FCC Rcd 8987, ¶ 7 (2002).

customer who received service under the same rate plan or promotion but who did not receive a concession."[78] The Commission stressed, however, that in "determining whether a violation of [sections 201 and 202] has occurred," it was appropriate to consider the "existence of robust competition in the CMRS market."[79] In view of that competition, the Commission explained, "consumers had ample opportunity to compare various terms and conditions in order to identify the package best-suited to their needs."[80] And that, in turn, rendered the complainants' allegations of "unjust" and "unreasonable" behavior, under sections 201 and 202, untenable.[81]

The same is true here. As set out in SBC's opening comments and again above, consumers that want standalone broadband have ample alternatives (including, increasingly, the telcos whose earlier policies gave rise to this proceeding in the first place). It follows that any decision to package additional services with broadband Internet access cannot be "unjust" or "unreasonable" under section 201 or 202.[82]

Indeed, any other result would be absurd. As we have explained, the communications industry is replete with examples of mandatory bundling. Wireless providers, for example, routinely bundle local and long-distance calling along with CPE. CLECs routinely sell long-distance service only when bundled with local, as do IP-based providers such as Vonage itself. Under commenters' "consumer choice" theory of sections 201 and 202, however, each of these bundles would run afoul of the Communications Act, since each of them purportedly interferes

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[78] *Id.*

[79] *Id.* ¶ 18.

[80] *Id.* ¶ 19.

[81] *See id.* ¶¶ 20, 26.

[82] Commenters' reliance on section 202 also fails insofar as they do not identify circumstances in which any broadband Internet access provider "discriminates" – *i.e.*, provides "'like'" services to similarly situated customers on different terms and conditions. *See id.* ¶ 14.

with the consumer's right to obtain any individual product or service she wants, irrespective of the efficiencies that come with selling the services as a package. That is not the law. The Commission has made clear that bundling – even mandatory bundling of enhanced services with local voice service by ILECs – is procompetitive and consistent with the Act, provided that the ILECs "are required to offer basic local exchange service on an unbundled, tariffed, nondiscriminatory basis."[83] In that circumstance, consumers are "able to purchase enhanced services from competitive providers and still obtain local service from the incumbent pursuant to the tariff."[84] This, in turn, "prevents the incumbent carriers from discriminating against customers who purchase enhanced service from competitive suppliers,"[85] rendering any allegation of "unjust" or "unreasonable" behavior in this context untenable. At least one commenter favoring regulatory intervention here concedes the point.[86]

None of the cases relied upon by commenters is to the contrary. In *In re AT&T's Private Payphone Commission Plan*, relied upon by EarthLink (at 3 n.5), the Commission found that a tying arrangement was contrary to section 201(b) where the absence of competition in the tying product market made it possible for "AT&T . . . to use its position in the [tying product] market to create leverage or gain unfair advantage in the more competitive [tied product] market."[87]

[83] *CPE Bundling Order* ¶ 44.

[84] *Id.*

[85] *Id.*

[86] NASUCA at 3 (conceding that the *CPE Bundling Order* endorses the benefits of bundling and makes clear that, because basic POTS service is available on a standalone basis pursuant to tariff, incumbent LECs "could not discriminate against their customers").

[87] 7 FCC Rcd 7135, ¶ 16 (1992). By EarthLink's own admission, the other case it relies upon (at 3 n.5), *In re Implementation of the Telecommunications Act of 1996*, 13 FCC Rcd 8061 (1998), establishes only that section 201(b) can be implicated where "carrier behavior is unreasonable and anticompetitive." *Id.* ¶ 85 n.316. Here, as we have explained, there is nothing "anticompetitive" about developing and deploying broadband service offerings that are responsive to consumer demand in a highly competitive market.

Here, however, the alleged tying product (broadband Internet access) is robustly competitive, making it impossible for any provider to obtain "leverage" or "unfair advantage" in *any* market by selling that product only as part of a bundle.[88] And in *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956), and *In re Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968), relied upon by Vonage (at 5-6), the D.C. Circuit and the Commission, respectively, struck down AT&T tariff provisions foreclosing the attachment of harmless devices to the telephone network. Contrary to Vonage's apparent misunderstanding of these precedents, neither case supports regulatory intervention to force the provision of service that the market itself is already making available.

The remaining claims of authority to mandate standalone broadband – or to make-up for its purported absence in the market – are equally untenable. WorldNet's proposed "remedy" to the supposed anticompetitive effects of broadband bundling is to require ILECs' to provide the entire package of bundled services to CLECs at a wholesale discount pursuant to section 251(c)(4).[89] But, for one thing, the whole point of the Commission's refusal to provide UNE access to the low-frequency-portion-of-the-loop ("LFPL") in the first place was to create incentives for CLECs to develop and deploy *competitive* advanced services, whether on their own or in partnership with competitive data providers.[90] WorldNet's proposed rule would undercut that rationale by permitting CLECs to free-ride on ILECs' broadband investment, thus diminishing incentives to invest by ILECs and CLECs alike. In any case, the statutory provision

[88] *See* SBC at 4, 26, 29-30; Verizon at 18-19; BellSouth at 3, 6-11; Qwest at 4.

[89] *See* WorldNet at 5.

[90] *Triennial Review Order* ¶ 270 (holding that it is the responsibility of the requesting CLEC to "take full advantage of an unbundled loop's capabilities," by providing broadband service on its own or in partnership with others).

on which WorldNet relies applies only to "telecommunications services" that the incumbent LEC provides at retail.[91] That provision does not extend to "information services,"[92] including broadband Internet access. It follows that where an incumbent LEC sells a bundle of an "information service" coupled with a "telecommunications service" – for example, broadband Internet access bundled with local voice service – to the extent the "telecommunications service" is offered "at retail" on a standalone basis, it must be made available to competitive carriers at the discount mandated by section 251(c)(4). As the Commission has squarely held, however, on no theory could that limited statutory obligation be expanded to sweep in "information services," which are expressly excluded from the scope of section 251(c)(4), merely when they happened to be sold as part of a bundle.[93]

RNK's proposal (at 19-22) that the Commission impose a standalone broadband offering in connection with the pending SBC/AT&T and Verizon/MCI mergers is likewise flawed. For one thing, the proposed reliance on a merger condition merely underscores the point that there is no statutory authority for the Commission to impose such a requirement in the ordinary course – *i.e.*, pursuant to notice-and-comment rulemaking. In any case, there has been no remotely plausible claim that the proposed mergers will in any way harm the vibrant competition in the broadband Internet access market, rendering it wholly inappropriate to condition approval of

[91] 47 U.S.C. § 251(c)(4); *see Triennial Review Order* ¶ 11.

[92] *See Triennial Review Order* ¶ 11.

[93] Memorandum Opinion and Order, *Application by Verizon New York Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, 16 FCC Rcd 14147, ¶ 42 n.93 (2001) ("We are not persuaded . . . Verizon should make its bundled offerings that include deregulated CPE and internet access available for resale. The resale obligation clearly extends only to telecommunications services offered at retail.").

those transactions on a standalone broadband mandate.[94] And, in all events, as noted above, if anyone has market power in the market for broadband Internet access, it is the cable providers, who have managed to resist pricing pressure from the ILECs while maintaining their majority share of the market. In view of that fact, it would be perverse in the extreme if the Commission were to saddle a *subset* of the nondominant, second-place telcos with a burdensome regulatory mandate that could increase their costs and force them to act inefficiently, while leaving the remainder of the industry – including the market-leading cable incumbents – free to respond to marketplace forces.

Finally, Vonage contends that the Commission should rely on its Title I authority to mandate standalone broadband and thereby "provide consumer relief."[95] Vonage fails to explain, however, precisely what "relief" consumers need that they cannot already obtain from the market. Again, the broadband Internet access market is highly competitive, and if consumers want standalone broadband, they can get it. In these circumstances, the Commission's Title I precedent dictates that regulatory intervention "is simply unwarranted."[96] As SBC noted in its opening comments, the Commission has resolved "to permit competitive forces, not government regulation, to drive the success of [the information services] industry," and "the success of the

[94] *Cf.* Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer* Control, 14 FCC Rcd 14712, 15198 (1999) (sep. statement of then-Commissioner Michael K. Powell) (observing that merger conditions should not be "a mountain of goodies designed to leave us, on balance, fat and happy," but rather should be calculated to "cure or remedy . . . identified harms").

[95] Vonage at 6-8.

[96] Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶ 128 (1980) (subsequent history omitted).

Internet today, is, in part, a direct result" of that policy.[97] In view of the "fierce competition" in broadband, there is no cause to change course here.

Moreover, Vonage's claim that a Title I mandate would further "the fundamental goals of the Act" is incorrect.[98] As SBC has already explained, the goals of the Act that are at issue here are set out in the plain language of the statute: The 1996 Act directs the Commission to "encourage the deployment . . . of advanced telecommunications capability" and to "remove barriers to infrastructure investment," while at the same time authoritatively adopting as the "policy of the United States" the objectives of "encourag[ing] the provision of new technologies and services to the public," "promot[ing] the continued development of the Internet," and "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[99] As SBC has explained in detail, a Commission command to provide standalone broadband Internet access irrespective of whether the market demands it would conflict with each of these statutory mandates.[100] No commenter provides any argument to the contrary.

C. In addition to confirming that there is no sound legal or policy rationale for a federal standalone broadband Internet access mandate, the Commission should also confirm that the states are likewise foreclosed from intervening in this highly competitive, fast-moving market. At least one state commission is presently considering imposing a "naked DSL"

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[97] *See* Jason Oxman, Office of Plans and Policy, FCC, *The FCC and the Unregulation of the Internet* at 6 (OPP Working Paper No. 31, July 1999).

[98] Vonage at 6-7.

[99] *See* SBC at 12-14 (quoting 47 U.S.C. § 157 & note; *id.* § 230(a)(4), (b)(1), (b)(2)).

[100] *See id.* at 25-29.

requirement as a condition of its approval of the pending Verizon/MCI merger.[101] But the Commission has already determined that DSL service "is an interstate service" that is subject to exclusive regulation by the FCC.[102] Where DSL is used as an input in an integrated broadband Internet access service, moreover, the resulting product is an "unregulated information service subject to Commission jurisdiction" and beyond the scope of state jurisdiction.[103] Accordingly, any effort by a state commission to impose a standalone broadband Internet access requirement – whether in the guise of regulation in the ordinary course or in connection with pending merger applications – would interfere with this Commission's exclusive jurisdiction and is preempted.[104]

III. COMMENTERS PROVIDE NO BASIS FOR REVISITING THE DECLARATORY RULING

In the *Triennial Review* proceeding, CompTel complained that ILECs were "tying" broadband service to local voice and that, as a result, consumers that wished to obtain broadband service from the ILEC while obtaining voice service from a competitor could not do so.[105] As a remedy for this supposed anticompetitive practice, CompTel advocated a "'low frequency' portion of the loop" UNE to "permit subscribers to obtain xDSL and local voice services from

[101] *See* Department of Public Service Staff White Paper, Case Nos. 05-C-0237 and 05-C-0242, at 5, 26 (N.Y. P.S.C. July 6, 2005) ("*NYPSC Staff White Paper*").

[102] Memorandum Opinion and Order, *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, ¶¶ 1, 25 (1998).

[103] *See* Memorandum Opinion and Order, *Petition for Declaratory Ruling That pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, ¶¶ 19-22 (2004).

[104] *See* Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Comm'n*, 19 FCC Rcd 22404 (2004); *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 1002-03 (D. Minn. 2003). *See also NYPSC Staff White Paper* at 26 n.65 (acknowledging questions about the lawfulness of a state-imposed "naked DSL" requirement).

[105] Comments of the Competitive Telecommunications Association, CC Docket Nos. 01-338, *et al.*, at 43 (FCC filed Apr. 5, 2002).

the providers they choose."[106] The Commission, however, "disagree[d]" with CompTel's claims and held that, rather than forcing ILECs to provide broadband service in circumstances where the market had not demanded it, the proper "remedy" was for a competitor "to take full advantage of an unbundled loop's capabilities" to offer broadband service itself or in partnership "with a second competitive LEC that will offer xDSL service."[107] The Commission properly reasoned that this result would encourage competitors to develop their own "bundled voice and xDSL service offering" and thus further the Act's goal of facilities-based competition.[108]

In the wake of the Commission's ruling, several state commissions in BellSouth's region ordered BellSouth to continue to provide DSL-based broadband service to customers who switched their voice service to a competing carrier. Reasoning that such a requirement was the functional equivalent of the proposed LPFL UNE that the Commission had rejected in the *Triennial Review Order*, BellSouth sought a declaratory ruling confirming that these requirements were in conflict with, and thus preempted by, the *Triennial Review Order*. In the *Declaratory Ruling* that gave rise to this proceeding, the Commission agreed. The Commission emphasized that, as a general matter, its unbundling determinations reflect a balance, and that state commissions are according foreclosed from countermanding those determinations and ordering unbundling where the Commission has held it to be counterproductive and inconsistent

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[106] *Id.*

[107] *Triennial Review Order* ¶ 270; *see also id.* ¶ 269 ("In the event that the customer ceases purchasing voice service from the incumbent LEC, either the new voice provider or the xDSL provider, or both, must purchase the full stand-alone loop to continue providing xDSL service.").

[108] *See id.* ¶ 261 (rejecting UNE proposals that would "discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings").

with the Act.[109] The Commission further reaffirmed that, as to the specific LFPL unbundling determination at issue, competing carriers were not impaired without access to the LFPL and that its ruling was necessary to foster "competitive incentives to deploy facilities" and thus to further the Act's goal of rapid "deployment of broadband facilities."[110]

Having now failed to convince the Commission on two separate occasions to require unbundling of the LFPL, several commenters try yet again. As they see it, the purported refusal of ILECs to make DSL available to consumers who take voice service from a competitor inhibits the ability of CLECs to compete in the market.[111] But the Commission has already considered and rejected this claim. Again, the proper "remedy" for any such difficulties is for the competitor "to take full advantage of an unbundled loop's capabilities" to offer broadband service, either by doing so itself or "by partnering with a second competitive LEC."[112] As the Commission determined, that result creates the proper incentives for competing providers to develop and deploy their own their own "bundled voice and xDSL service offering," and any other result would "discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings."[113] Commenters offer nothing to call either conclusion into question.

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[109] *See* Memorandum Opinion and Order and Notice of Inquiry, *BellSouth Telecommunications, Inc. Request for Declaratory* Ruling, 220 FCC Rcd 6830, ¶¶ 25-27 (2005) ("*Declaratory Ruling*").

[110] *Id.* ¶¶ 28-29.

[111] *See* RNK at 3; Texas Office of Public Utility Counsel ("TPOC") at 3-4; Maryland PSC at 1-2.

[112] *Triennial Review Order* ¶ 270 (emphasis added); *see also id.* ¶ 269 ("In the event that the customer ceases purchasing voice service from the incumbent LEC, either the new voice provider or the xDSL provider, or both, must purchase the full stand-alone loop to continue providing xDSL service.").

[113] *Id.* ¶ 261.

In this respect, EarthLink is glaringly wrong to suggest that the Commission's ruling "prevents" ISPs from offering high-speed Internet access service to consumers that choose the local exchange service of a competitive carrier.[114] EarthLink itself has proven time and again that it is fully capable of partnering with competitive providers to offer bundles of services that include high-speed Internet access. EarthLink just recently announced an arrangement with Covad pursuant to which the companies will join together to provide high-speed Internet access and VoIP,[115] it has previously reported that its "largest provider of broadband connectivity is Covad,"[116] and it has also entered into alliances with competitors such as Time Warner Cable, OmniSky wireless data, ATT Broadband (now Comcast), and Go America Wireless Data, to name a few.[117] Indeed, even as it has pointed to "cable-based broadband" as "the dominant form of broadband Internet access,"[118] EarthLink has acknowledged that "[t]he intensity of competition in the telecommunications industry has resulted in significant declines in pricing for telecommunications services that we purchase, and such declines have had a favorable effect on our operating performance."[119] Again, the core point of the Commission's determination not to unbundle the LFPL was to facilitate competitive arrangements between CLECs and others that would foster true facilities-based competition. In view of EarthLink's established practice of

[114] EarthLink at 4-5.

[115] *See* Press Release, EarthLink, Inc., *EarthLink and Covad Announce Market Trial of Innovative Bundle of Phone Services and High-Speed Internet* (June 6, 2005).

[116] EarthLink, Inc., Form 10-K/A for the fiscal year ended December 31, 2002, at 26-27 (SEC filed Apr. 1, 2003) ("EarthLink Form 10-K/A").

[117] *See* EarthLink Form 10-K/A, at 20.

[118] Comments of EarthLink, Inc., *Inquiry Concerning High-Speed Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, at 2 (FCC filed Dec. 1, 2000).

[119] EarthLink, Inc., Form 10-K for the fiscal year ended December 31, 2003, at 10 (SEC filed Mar. 5, 2004) (emphasis added).

successfully doing exactly that, its complaints about the effect of the *Triennial Review Order* and the *Declaratory Ruling* cannot be credited.[120]

Finally, it is beside the point that certain state commissions, notwithstanding the Commission's repeated holdings on this issue, have found the ILECs' refusal to unbundle the LFPL to be anticompetitive.[121] The Commission itself, in the *Triennial Review Order*, made the contrary finding, and it properly reaffirmed that finding in the *Declaratory Ruling*: state requirements that mandate unbundling of the LFPL "undermine the effectiveness of the incentives for deployment, including the advancement of section 706 goals that were at the heart of the Commission's mass market loop unbundling rules."[122] That carefully reasoned statement reflects the Commission's repeated views on the matter, and there is no basis for the Commission to revisit it here.[123]

IV. THE BUNDLING OF DSL-BASED BROADBAND INTERNET ACCESS DOES NOT CONSTITUTE AN UNLAWFUL TIE-IN UNDER THE ANTITRUST LAWS

CompTel/ALTS and EarthLink casually assert that the practice of bundling broadband Internet access service with local voice service – and of not selling the broadband service separately – constitutes unlawful tying under the antitrust laws.[124] They are wrong. As SBC explained in its opening comments, and as no party disputes, unlawful tying requires, first and

[120] *See also* Verizon at 21 (stressing the increasing prevalence of partnering arrangements that permit providers "to offer a wider range of services").

[121] *See, e.g.*, RNK at 6-9; NASUCA at 4-6.

[122] *Declaratory Ruling* ¶ 30.

[123] The state commissions' view on the matter are also undercut by the fact that, because, as noted above, broadband Internet access is an interstate information service, and in light of Congress's decision that the Internet should remain "unfettered" by state or federal regulation, 47 U.S.C. § 230(b)(2), state regulation of interstate information services is necessarily prohibited. *See, e.g.*, *Vonage*, 290 F. Supp. 2d at 997.

[124] *See* CompTel/ALTS at 7-8; EarthLink at 2-3.

foremost, the existence of "sufficient power within [the tying product] market to be able to force buyers to purchase the tied product."[125] Here, the alleged tying product is xDSL-based broadband Internet access, which, as explained above, is just one among many broadband products in a highly competitive, rapidly evolving market.[126] Indeed, as also explained above, if there are any providers with market power in this area, it is the incumbent cable operators, who, in the face of aggressive pricing promotions from telcos, have in the past "refused to drop cable modem prices"[127] and have been able to "protect[] margins" without "measurably reducing market share."[128] In view of this evidence, the suggestion that *telco* providers of broadband Internet access have market power cannot be taken seriously.[129]

Commenters' only response to this point is to assert – without explanation or analysis of any kind – that xDSL-based Internet access exists in a market of its own and thus does not compete against the cable incumbents and other emerging broadband providers.[130] Even a casual observer of the industry recognizes the fallacy of this point, however, and indeed when the FCC previously failed to acknowledge the robustly competitive market in which DSL competes, the D.C. Circuit quickly brought it to heel.[131] What is more, as SBC has explained, the Commission

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[125] *E.g.*, *General Cigar Holdings, Inc. v. Altadis, S.A.*, 205 F. Supp. 2d 1335, 1355 (S.D. Fla. 2002); *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 37 (1984) (defendant "must have power in the tying-product market"); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 443 (3d Cir. 1997) ("The first inquiry in any § 1 tying case is whether the defendant has sufficient market power over the tying product, which requires a finding that two separate product markets exist and a determination precisely what the tying and tied products markets are.") (internal quotation marks omitted).

[126] *See* Comcast at 3 & n.11; BellSouth at 15-18; Verizon at 7, 19; Qwest at 3.

[127] *Broadband Competition*, *supra*, at 3.

[128] *2005 Industry Outlook*, *supra*, at 2.

[129] *See* BellSouth at 15-18; Verizon at 7, 19; Qwest at 3-4.

[130] *See, e.g.*, CompTel/ALTS at 7-8.

[131] *See USTA I*, 290 F.3d at 428-29.

itself, like the FTC and the Department of Justice, has *already* correctly concluded that xDSL-based broadband Internet access is "reasonably interchangeable" with, and thus in the same market as, other broadband Internet access products.[132] Commenters' attempt to will away this finding, simply by pretending it does not exist, is unavailing.[133]

CONCLUSION

Communications service bundles – including the bundling of broadband Internet access service with legacy services – are enormously pro-competitive. There is no cause for the Commission to intervene in the market.

[132] *See, e.g.*, *Triennial Review Order* ¶¶ 262, 292; Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.7-29.5 GHZ Frequency Band, To Reallocate the 29.5-30.0 GHZ Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite* Services, 15 FCC Rcd 11857, ¶ 23 (2000); *accord* DOJ Competitive Impact Statement, *United States v. AT&T Corp. and MediaOne Group, Inc.* at 9 (filed May 25, 2000); Complaint, *In re America Online, Inc. and Time Warner Inc.*, Docket No. C-3989, ¶ 21 (FTC filed Dec. 14, 2000). *See generally* SBC at 31 & n.84.

[133] The OSS-related claims raised by the TOPC (at 3-4) are both beyond the scope of this proceeding and incorrect. In particular, TOPC asserts that, when a CLEC in Texas places a new order to provide voice service to a customer that receives DSL-based broadband Internet access from SBC, the CLEC "eventually" receives an "error" message, rather than an immediate reject. TOPC at 3. In fact, SBC Texas' OSS are programmed to accept or reject such orders immediately, depending on the type of service requested by the CLEC (UNE-P, resale, or UNE-L).

Respectfully submitted,

/s/ Colin S. Stretch

Colin S. Stretch
Joseph J. Bial
KELLOGG, HUBER, HANSEN,
TODD, EVANS, & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Jack Zinman
Gary L. Phillips
Paul K. Mancini
SBC COMMUNICATIONS INC.
1401 I Street, N.W.
Washington, D.C. 20005
(202) 326-8800

Counsel for SBC Communications Inc.

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